IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON,)
DENNIS P. BULLARD,)
ROBERT J. BULLARD,)
BARBARA L. LAWRENZ,)
RUTH ANN LIBBY,)
KATHRYN M. ROBINSON,)
JOHN M. SPANTON,)
JOAN GODLOVE)
Plaintiffs,)
)
vs.) Case No. 02-CV-425-E
)
RICHARD BRADY PFEIL;)
MARY JOAN PFEIL;)
LEWIS N. CARTER;)
DOERNER, STUART,)
SAUNDERS, DANIEL &)
ANDERSON; DOERNER)
STUART, SAUNDERS,)
DANIEL, ANDERSON,)
BIOLCHINI; DOERNER)
SAUNDERS, DANIEL &)
ANDERSON; DOERNER,)
SAUNDERS, DANIEL &)
ANDERSON, L.L.P.;)
GEORGE M. HOFFMAN; NEAL)
GERGER & EISENBERG;)
JOHN DAVIDHOOVER;)
BARRY BOXER;)
IRA SPANIERMAN;)
SPANIERMAN GALLERY;)
HARRY D. SHAPIRO;)
RAYMOND J. HOROWITZ;)
SCOTT E. HERSHMAN;)

PHILLIPE M. SALOMON;)
HIRSCHL & ADLER)
GALLERIES, INC.,and)
BARRETT W.)
FREEDLANDER,)
Defendants.)

ORDER

Now before the Court is the Motion to Dismiss Complaint (docket #33) of the Defendants, Lewis N. Carter; Doerner, Stuart, Saunders, Daniel & Anderson; Doerner, Stuart, Saunders, Daniel, Anderson & Biolchini; Doerner, Saunders, Daniel & Anderson; Doerner, Saunders, Daniel & Anderson, L.L.P., the Motion to Dismiss Amended Complaint (docket #34) of the Defendants John David Hoover, Barry Boxer, Ira Spanierman, and Spanierman Gallery; the Motion to Dismiss Amended and Supplemental Complaint (docket #35) of the Defendants Raymond J. Horowitz and Scott E. Hershman, the Motion to Dismiss (docket #37) of the Defendant Harry D. Shapiro, the Motion to Dismiss, or to Strike Amended and Supplemental Complaint (docket #38) of the defendants Richard Brady Pfeil and Mary Joan Pfeil, George M. Hoffman, Neal Gerber, and Hirschl & Adler, and the Motion to Dismiss Amended and Supplemental Complaint (docket #40) of the Defendants Phillipe M. Salomon.

Plaintiffs (with the exception of Joan Godlove) are descendants of the heirs of American Impressionist Theodore Robinson. One of the Plaintiffs, Thomas R. Hutchinson, has been trying, since 1992, to establish an undivided one-third interest in and title to a painting Theodore Robinson, "Summer Hillside." In the 1992 action, *Thomas R. Hutchinson, as*

Personal Representative of the Estate of Robert W. Hutchinson, deceased, plaintiffs, versus Richard Pfeil and Mary Jo Pfeil, defendants, case number 92-C-1088-E, plaintiff sought not only an interest in the pointing, but also partition and an accounting, on the theory that the Pfeils' acquired the painting from someone who acquired it from only one of three owners without permission of the other two owners. Hutchinson was an heir of one of the two owners that allegedly did not consent to (or know about) the sale.

In the course of litigating the issues in the 1992 case, Defendants, through their attorney, Lewis Carter, raised defenses of lack of jurisdiction and venue. The Court allowed limited discovery on those issues. In the course of that discovery, substantial disputes arose. Eventually, Magistrate Judge John Leo Wagner denied Plaintiff's discovery motion, and issued an Order awarding sanctions against Plaintiff and his attorney in the amount of $7,414.77. Although the motion to dismiss on jurisdictional grounds was denied, Plaintiffs in this case seek to have the December 22, 1993 Sanction Order and the February 18, 1998 District Court Order affirming the Sanction Order vacated on the basis that they were procured by fraud upon the court. In addition, Plaintiffs bring claims against Defendants for conversion and civil conspiracy, negligent supervision, attorney deceit and collusion, and violation of RICO, all theories based on the premise that the two Orders were procured through fraud upon the court.

Defendants have filed a host of motions to dismiss, arguing that plaintiffs fail to state a claim, that their claims are barred by statutes of limitations, and that their claims are time barred. Plaintiffs, of course, dispute these allegations.

Legal Analysis

Plaintiffs correctly point out that, in considering a motion to dismiss for failure to state a claim, a court "must accept as true all factual allegations in the complaint, construe them in a light most favorable to the plaintiff, and resolve all reasonable inferences in plaintiff's favor." *Seamons v. Snow*, 84 F.3d 1226, 1231-32 (10th Cir. 1996). Notwithstanding *Seamons*, the Court must evaluate the allegations in plaintiffs' amended complaint in light of common sense and existing law.

The Court will first turn to the issue of whether Plaintiffs' Complaint states a claim for fraud on the court. In arguing that there was fraud on the court, Plaintiffs take the same positions on the issue of sanctions that they took in the previous case. The gravamen of Plaintiffs' claim is that Lewis Carter, attorney for the Pfeils in the underlying case, committed fraud on the Court when he argued the discovery issues before the Magistrate Judge, this Court, and the Court of Appeals. It is important to note that Plaintiffs' fraud claim does not rely on any new arguments and does not point to any facts that were unknown or obscured[1] at the time the decisions on the discovery issues and sanction award were rendered. In other words, Plaintiffs rely on the exact same arguments and interpretation of the record to defeat the sanction award in this case that they relied on in the underlying case. In essence, by labelling counsel's conduct as "fraud" Plaintiffs are seeking another opportunity to prevail on their claim using arguments

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[1] Certainly, Plaintiffs argue that the Pfeils, through their attorney misrepresented facts central to their jurisdictional defense to the Court. The point is that the Plaintiffs, at the time the discovery issues and sanctions were litigated believed that facts were misrepresented, and made that argument to the Courts.

identical to the ones that were rejected by the Magistrate Judge, this Court, and the Court of Appeals. If Plaintiffs were allowed to proceed with their "fraud" claim, every litigant would have the opportunity to "reopen" final judgments simply by characterizing opposing counsel's argument as fraudulent or misleading. Common sense dictates that a claim for fraud requires something more. There must be some behavior in addition to the mere advancement of a legal argument.

A review of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259 (10th Cir. 1995) shed light on what that "something more" must be. The Court in *Robinson* summarized the facts in *Hazel-Atlas Glass* as follows:

> In that case, attorneys and agents of respondent Hartford, in order to help Hartford obtain a patent, had prepared and submitted a spurious trade journal article to the U.S. Patent Office. Hartford's application for the patent was granted, and Hartford later brought suit against petitioner Hazel-Atlas alleging infringement of the patent. A lower court found no infringement. The case was then appealed to the circuit court. In the course of the appeal, one of the attorneys who had played a part in getting the spurious article published referred the circuit court to the article. Relying in part upon the article, the circuit court concluded that the patent was valid and reversed the judgment. Hazel-Atlas then brought an action in the circuit court setting forth the circumstances surrounding the use of the spurious article and requesting relief from the judgment. The circuit court refused to grant relief, however, citing among other things, a lack of diligence on

> Hartford's part and a belief that the court has no power to set aside a judgment after the end of the term of court at which the judgment was entered.
>
> On appeal from that ruling, the Supreme Court held that federal courts have inherent equitable power to grant relief in cases of after-discovered fraud regardless of the "end of term rule," and concluded that "every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments."

56 F.3d at 1266 (quoting *Hazel-Atlas Glass,* 322 U.S. at 245-46).

This analysis of *Hazel-Atlas Glass* reveals that the alleged fraud in this case is different from that in *Hazel-Atlas Glass* in two very important respects. First, the fraudulent conduct in *Hazel-Atlas Glass* was based on the attorney's involvement in the preparation and submission to the U.S. Patent office of a spurious trade journal article. Second, the fraud in Hazel was discovered after the judgment was entered. In the present case, the only alleged fraud is in the framing of and making arguments to the Court. Moreover, Plaintiffs controverted Defendants' defenses in the 1994 case using the exact same arguments they now use to demonstrate fraud. In addition, the Court had before it, in the 1992 case, the law and the factual record, and did review both at length before making a ruling. There is nothing "after discovered" here. Plaintiffs' allegations, taken as true, simply do not constitute actionable "fraud on the court," as described in *Hazel-Atlas Glass.*

In light of the dismissal of Plaintiffs' "fraud on the court" claim, Plaintiffs' claims for conversion and civil

conspiracy, negligent supervision, and attorney deceit and collusion, and violation of RICO must also fail. These claims, like the "fraud on the court" claim, are nothing more than an attempt to re-litigate the sanctions levied in the 1992 case by putting new labels on old arguments.

Defendants request monetary sanctions as well as filing restrictions against Plaintiffs. The Court declines to consider monetary sanctions at this time. The parties are not, however, precluded from raising this issue again, at the conclusion of any appeal, or after the time has run for perfecting an appeal, if Plaintiffs choose not to pursue an appeal. With respect to filing restrictions, the Court must conclude, based on this thinly veiled attempt for another bite at the apple on the issue of whether Plaintiffs' counsel's conduct was sanctionable in the 1992 case, as well as the record in this case and the related cases in this jurisdiction, that Plaintiffs' counsel is "an individual who simply refuses to accept the judgments of the courts." *Stafford v. United States,* 208 F.3d 1177, 1178 (10th Cir. 2000). Accordingly, in an attempt to streamline this matter that has dragged on far longer than necessary, Plaintiffs are directed not to file any pleading in this case which would seek this Court's reconsideration or revisiting of the issues decided in this Order.

The Motion to Dismiss Complaint (docket #33) of the Defendants, Lewis N. Carter; Doerner, Stuart, Saunders, Daniel & Anderson; Doerner, Stuart, Saunders, Daniel, Anderson & Biolchini; Doerner, Saunders, Daniel & Anderson; Doerner, Saunders, Daniel & Anderson, L.L.P., the Motion to Dismiss Amended Complaint (docket #34) of the Defendants John David Hoover, Barry Boxer, Ira Spanierman, and Spanierman Gallery; the Motion to Dismiss Amended and Supplemental

Complaint (docket #35) of the Defendants Raymond J. Horowitz and Scott E. Hershman, the Motion to Dismiss (docket #37) of the Defendant Harry D. Shapiro, the Motion to Dismiss, or to Strike Amended and Supplemental Complaint (docket #38) of the defendants Richard Brady Pfeil and Mary Joan Pfeil, George M. Hoffman, Neal Gerber, and Hirschl & Adler, and the Motion to Dismiss Amended and Supplemental Complaint (docket #40) of the Defendants Phillipe M. Salomon are **GRANTED.** The Motion for Sanctions (docket #42) of Defendants Hoover, Boxer, Spanierman and Spanierman Gallery, The Motion to Deem Motion to Dismiss Confessed (docket #43) of Defendants Horowitz and Hershman, and Joined by Defendants Hoover, Boxer, Spanierman and Spanierman Galleries (docket #46), the Motion for Rule 11 Sanctions (docket #77) of the Defendants Pfeil, Pfeil, Hoffman, and Gerber, the Motion to Certify Question (docket #79) of the Plaintiffs, and the Motion for Sanctions, to Strike, and for Attorney Fees (docket #82) of the Plaintiffs are **DENIED AS MOOT. Plaintiffs are directed not to file any pleading in this case which would seek this Court's reconsideration or revisiting of the issues decided in this Order.**

IT IS SO ORDERED THIS 6th DAY OF MARCH, 2003.

s/ James O. Ellison

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT